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Supreme Court of the United States of America

October Term, 1939.

No. 9 Original.

STATE OF ARKANSAS,
Complainant,

v.

STATE OF TENNESSEE,
Defendant.

[redacted]Y BRIEF FOR STATE OF TENNESSEE.

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REPLY BRIEF FOR THE STATE OF TENNESSEE.

May It Please the Court:

Since, in the opinion of counsel for the State of Tennessee, the statement of the case made in the brief on behalf of the complainant, State of Arkansas, does not adequately set forth the situation presented to this Court by the record, the defendant, State of Tennessee, desires, conformably with the rules of this Court, to amplify and supplement such statement, both as to the nature of the suit and as to the evidence adduced by the parties in support of their respective contentions.

NATURE OF THE CASE.

This is an action brought by the complainant, State of Arkansas, against the State of Tennessee to establish the boundary line between the two states at or near the formation known in this record as Moss Island. The complainant brings this suit to establish its political jurisdiction over the lands in question, as distinguished from its ownership or title thereto. This distinction should be kept in mind because numerous of the authorities relied upon by the complainant in support of its contentions deal with situations where the ownership of the land in question was at issue rather than political jurisdiction over the same.

The State of Arkansas in its brief filed in this Court, expressly concedes that it does not have the proprietary ownership of the lands in question (see Brief for Appellant, pp. 17-18). The record likewise discloses that the State of Tennessee has parted with all its title or ownership of said lands by making grants of the several portions thereof to various parties whose vendees are not parties to this litigation and hence under well accepted principles of law, the complainant may not maintain this suit for the purpose of establishing its ownership of said lands but on the contrary, it can only be maintained as a suit to establish its political jurisdiction over such by virtue of the claim that they are located within its boundaries.

The defense relied upon by the defendant and sustained by the Special Master to whom the case was referred, is that of adverse possession. The Special Master found that from 1826 until the date of the filing of the present suit (October 28, 1935), Tennessee has continuously exercised dominion and

urisdiction over the lands in controversy (Report of Special Master, p. 78, paragraph 11). This finding of fact of the Special Master was not made the subject of exceptions at the hands of the complainant.

STATEMENT OF FACTS.

The defendant concedes that prior to 1821 the lands in question constituted a peninsular some 3 to 4 miles in length, jutting into the Mississippi River and being a part of the west shore thereof. It likewise concedes that in February, 1821, an avulsion occurred which had the effect of causing the Mississippi River to forcibly cut for itself a new channel across a narrow portion of this peninsular and thus physically separate the lands in controversy from the remainder of the western shore of the Mississippi River. The Master found, and his finding in this respect is unexcepted to, that prior to the date of the admission of the complainant into the Union (June 15, 1836), this new channel, carved by the forces of nature, had become the main channel of the Mississippi River, and that the lands at that time lay east of the main channel of the Mississippi River at that point (Report of Special Master, p. 77, paragraphs 4, 6; see also Report of Master, pp. 38-48 inclusive).

As early as the year 1823, Tennessee began to treat these lands as part of its domain. In that year an entry of all that portion of the island created by the aforesaid avulsion, not thought to be covered by a previous grant of a portion thereof by the State of North Carolina, was made in the entry taker's office of the appropriate land district in Tennessee and in 1824 a survey was duly made thereof (Tennessee Exhibit No. 2, Tr., pp. 77-78, introduced Tr., p. 17). Upon this entry and

survey, the State of Tennessee, in the year 1839, duly issued its grant for the lands embraced in such survey (Tenn. Ex. 7, Tr., pp. 85-86, introduced Tr., p. 20).

At a later date, Tennessee permitted the making of entries and surveys and issued grants thereof to substantially the remainder of the lands covered by the old channel of the Mississippi River (Tenn. Ex. 8, Tr., p. 87, introduced Tr., pp. 21-22; Tenn. Ex. No. 9, Tr., pp. 88-89, introduced Tr., p. 22; Tenn. Ex. No. 10, Tr., pp. 89-90, introduced Tr., p. 22).

At a later date a grant was duly made by the State of Tennessee to that portion of the land covered by the previous grant made by the State of North Carolina (Tenn. Ex. No. 11, Tr., pp. 90-91, introduced Tr., p. 22). This last grant was made in 1867, while all the others above mentioned were made previous to the year 1860.

Likewise, it is in evidence that from 1831 until 1840 Tennessee exercised exclusive jurisdiction over the area in question and that the Sheriff of Dyer County, Tennessee (the county in which the area will lie if a part of Tennessee) served process thereon and collected taxes therefrom (Tenn. Ex. No. 49, Tr., pp. 156-161, introduced Tr., p. 55; Testimony H. Clark, Tr., p. 158; Testimony of Isaac Sampson, Tr., p. 160).

The record of taxation by the State of Tennessee and Dyer County prior to the year 1870 can not be found due no doubt to the destruction of the courthouse of Dyer County during the Civil War (Tr., p. 50). However, the record does show that in 1848 the State of Tennessee sold a portion of the lands involved in this litigation for delinquent taxes (Tenn. Ex. No. 42, Tr., pp. 108-113, introduced Tr., p. 48).

From the year 1870 until the present date, the records of Dyer County, Tennessee, show both an assessment and collection of taxes from substantially all the lands involved in this litigation (Tenn. Ex. No. 40, Tr., pp. 95-102, introduced Tr., p. 47; Tenn. Ex. No. 41, Tr., pp. 102-108, introduced Tr., p. 48; Tenn. Ex. No. 44, Tr., pp. 117-131, introduced Tr., p. 50; Tenn. Ex. No. 45, Tr., pp. 131-147, introduced Tr., p. 50.

The record likewise shows that as early as 1870 the children upon this island were attending schools maintained by Tennessee (Testimony S. C. Mitchell, Tr., pp. 2-3) and that as early as 1882, the State of Tennessee was holding elections upon the territory in question and that the Courts of Tennessee were exercising jurisdiction of criminal offenses alleged to have been committed upon the territory in controversy and that upon one occasion a citizen who resided in the territory in controversy was elected to the office of Justice of the Peace for Dyer County (Testimony S. C. Mitchell, Tr., pp. 3-5).

The record likewise shows that marriages were performed under the authority of the State of Tennessee in the territory in question and that the State of Tennessee assessed road taxes and poll taxes upon the residents in this area (Testimony S. C. Mitchell, Tr., p. 4; Testimony G. L. Scott, Tr., pp. 13-14; Testimony C. C. Johnson, Tr., pp. 33-34).

It is also shown that the persons in possession of the area in controversy deraign their title from the State of Tennessee (Testimony F. W. Latta, Tr., pp. 56-57).

In addition to the foregoing facts, it is shown that no one ever knew any of the residents of the disputed territory to have voted in the State of Arkansas, nor, for a period of time covering substantially from the year 1880 up to the date of the filing of the suit, were officers of the State of Arkansas

ever known to make any arrests or serve process upon the territory in question (Testimony S. C. Mitchell, Tr., p. 5; Testimony C. C. Johnson, Tr., p. 34).

In addition to the foregoing proof of residents of the territory in question as to the failure of the complainant to exercise any political jurisdiction thereover, the defendant introduced as a witness E. M. Huffman, a resident of the State of Arkansas, who was Justice of the Peace in the township in Arkansas opposite the lands in controversy, for a period of 40 years, from 1884 until 1924. Mr. Huffman, during the 40 years which he served as Justice of the Peace in Arkansas, never knew of the State of Arkansas undertaking to exercise any jurisdiction whatsoever over the inhabitants of the territory in question, he never knew of any of the residents of the area in controversy either voting or attempting to vote in Arkansas at any elections held under the authority of Arkansas and testifies that he always heard this area spoken of as Tennessee and never heard it called Arkansas in his life (Testimony E. M. Huffman, Tr., pp. 8-11).

The State of Arkansas, in its subdivision, was surveyed into townships and sections by the General Land Office, while on the contrary, the State of Tennessee was never so surveyed. The transcript discloses that the State of Arkansas so far as its tax records are available, has never made an attempt to assess or collect taxes on any of the lands in controversy in the present case (Testimony Byron Morse, Tr., p. 41). Likewise, his testimony shows that the land in question was never surveyed and sectionalized by the United States Government (Tr., p. 41), and likewise that no conveyances purporting to convey title or create liens against any of the lands in this area are of record in Arkansas (Tr., p. 41).

That the land in controversy was never surveyed and sectionalized is also established by other evidence in the record (Testimony L. O. Brayton, Tr., p. 25; Testimony F. W. Latta, Tr., p. 51).

In 1900 the United States established a Postoffice at the town of Chic, terming it "Chic, Dyer County, Tennessee" (Tenn. Ex. No. 1, Tr., 76c, introduced Tr., p. 5). This Postoffice was located within the territory in controversy (Testimony C. C. Johnson, Tr., pp. 33-34; Testimony F. W. Latta, Tr., p. 56).

None of the above facts were disputed by the complainant. In addition thereto, the question as to whether or not these lands were in Tennessee or in Arkansas came before the Supreme Court of Tennessee upon two separate occasions. The first was in the case of *Moss* v. *Gibbs*, 57 Tenn., 283, and the second in the case of *Laxon* v. *State*, 126 Tenn., 302. In each of these cases was the jurisdiction of the Courts of Tennessee over the territory in question maintained by the Supreme Court of Tennessee (Tenn. Ex. No. 50, Tr., pp. 162-170, introduced Tr., p. 58; Tenn. Ex. No. 51, Tr., pp. 171-176, introduced Tr., p. 58).

The omission of the Federal Government to survey and sectionalize the territory in question was not inadvertent or caused by a lack of knowledge. The record discloses that in 1848 the attention of the General Land Office was called to this situation by the surveyor of the public lands in Arkansas and that the surveyor of the public lands was authorized to make a survey "if it is not claimed by the State of Tennessee" (Tenn. Ex. No. 52, Tr., pp. 177-179, introduced Tr., p. 59; Tenn. Ex. No. 53, Tr., pp. 180-181, introduced Tr., p. 59).

As remarked by the Master, the inference would seem clea that the question of surveying and sectionalizing this lan was dropped because the statement that the State of Ten nessee did not claim the land in question was found to b erroneous (Report of Special Master, p. 35).

So far, therefore, as the facts are concerned, it is thoroughl established by the record that since 1826, the State of Ten nessee has been exercising political jurisdiction over the terr tory in question to the exclusion of the complainant, State o Arkansas, and that jurisdiction over the lands in controvers has neither been exercised nor sought to be exercised by th State of Arkansas until within less than thirty days prior t the filing of the present suit. Likewise, it is clear that so fa as the United States is concerned, in every action in which i has taken, involving the territory in question, it has treate it as being a part of the State of Tennessee. Its failure t show the land in question as a part of the State of Arkansa upon any maps issued by the General Land Office, its failur to survey and sectionalize the lands in question as a part o Arkansas and the establishment of this Postoffice under Tennessee designation on the lands in controversy indicate it treatment of the lands as being a part of Tennessee.

PROPOSITIONS OF LAW.

I.

The lands in controversy being a part of the public domain, not having been acquired by the United States with the consent of Arkansas, nor reserved for any of the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution of the United States, were subject to the political jurisdiction and police power of the State of Arkansas.

Surplus Trading Co. v. *Cook*, 281 U. S., 647;
Omaechevaria v. *U. S.*, 246 U. S., 343;
Fort Leavenworth Ry. Co. v. *Lowe*, 114 U. S., 525.

II.

Adverse possession, on the part of one state, of territory in dispute, bars the claim of another state thereto although otherwise, such barred state might possess jurisdiction thereover.

Vermont v. *New Hampshire*, 289 U. S., 592-93;
Michigan v. *Wisconsin*, 270 U. S., 295;
New Mexico v. *Colorado*, 267 U. S., 30;
Maryland v. *West Virginia*, 217 U. S., 1;
Louisiana v. *Mississippi*, 202 U. S., 1;
Virginia v. *Tennessee*, 148 U. S., 503;
Indiana v. *Kentucky*, 136 U. S., 479;
Missouri v. *Kentucky*, 11 Wall., 395;
Rhode Island v. *Massachusetts*, 4 Howard, 591;
Direct United States Cable Co. v. *Anglo-American Telegraph Co.*, L. R. 2 App. Cases 394, 420;
Vattel's Law of Nations, 6th Ed., 187, 190, 191;
Wheaton's International Law, 6th Eng. Ed., 336-7;
Hyde, International Law, Section 116;
Hall, International Law, Section 31, 36.

III.

No color of title or claim of right is necessary to support adverse possession, as between individuals, where a clear intent to hold adversely be present.

Guaranty Title Co. v. *U. S.*, 264 U. S., 200.

Apparently the same rule applies to adverse possession between nations.

Hall, International Law, *supra;*
Hyde, International Law, *supra.*

IV.

The rule of the thalweg is but a rule of international law used in the construction of grants, designed to accord to states, bordering on a common navigable waterway, equality of access to the thread of navigation thereof.

New Jersey v. *Delaware*, 291 U. S., 361, 383.

This rule yields to the principle of law that an avulsion does not change boundaries theretofore fixed at such thalweg.

Nebraska v. *Iowa*, 143 U. S., 359.

Likewise, this rule of construction yields to positive language at variance therewith.

Oklahoma v. *Texas*, 256 U. S., 70;
Texas v. *U. S.*, 162 U. S. 1;
Handly's Lessee v. *Anthony*, 5 Wheat. 375;
Buttenuth v. *St. Louis Bridge Co.*, 123 Ill., 535, 17 N. E., 439;
Hyde, International Law (1922 Ed.), p. 247-8.

There is a clear intimation in *New Jersey* v. *Delaware*, *supra*, that it yields to prescriptive rights.

See page 383 of opinion.

Likewise, the same intimation is clearly made in *Vermont* v. *New Hampshire, supra.*

See Opinion page 613.

In *Michigan* v. *Wisconsin*, 270 U. S., 295, where the rule of the thalweg otherwise would be applicable, adverse possession was held to be applicable and to prevail.

V.

The case of *Arkansas* v. *Tennessee*, 246 U. S., 158, and *Arkansas* v. *Mississippi*, 250 U. S., 39, are not controlling upon the following grounds:

(a) In neither of these cases was adverse possession present in fact nor was such contention made nor considered by this Court.*

(b) The insistence in each of these cases was that the complainant therein, by legislative acts and judicial decisions, had treated a line equidistant from the well-defined banks of the Mississippi River as its eastern boundary and was therefore estopped to insist upon the application of the rule of the thalweg.

VI.

The authorities do not make the right of one state, to acquire territory from another, through prescription or adverse possession, depend upon difficulty of delineation of the true boundary between such states.

Maryland v. *West Virginia, supra;*
Michigan v. *Wisconsin, supra;*
Vattel's Law of Nations;
Wheaton's International Law, *supra;*
Hall, International Law, *supra;*
Hyde, International Law, *supra.*

*See footnote to page 68, Report of the Special Master.

VII.

No reason appears why the doctrine of adverse possession should not apply to the present situation. The mistake as to which, from a legal standpoint, constituted the main channel of the Mississippi River was one of law and the channel claimed by Tennessee as the main channel was in fact such (Summary (6), p. 77 Report of Special Master).

The recognition of this natural waterway as the true boundary line by the complainant and adverse possession up to said boundary by the defendant should bar the complainant as effectively as a like possession in connection with a boundary delineated by man.

REPLY TO CONTENTIONS ON BEHALF OF THE COMPLAINANT.

I.

We concede the rule of the thalweg but insist that it yields to the adverse possession on the part of Tennessee clearly shown by this record.

II.

The Special Master did not misapply or misconstrue the doctrine of adverse possession nor the nature of this suit, neither did counsel for the defendant.

See pp. 75-76, Report of Special Master;
See Reply Brief of Defendant on hearing Before Master, pp. 3, 4.

III.

Title to the lands in question is not in controversy in this litigation but on the contrary, political jurisdiction is the matter at issue. Therefore, the authorities relied upon by the State of Arkansas are not in point.

IV.

No contention is being made or has been made by Tennessee that the Congressional Acts set forth in the brief of complainant vest in Tennessee political jurisdiction over the land in controversy, since such acts relate to the title to lands therein embraced and not to political jurisdiction.

V.

Arkansas at all times since 1836 has been capable of exercising political jurisdiction over the lands in controversy and the authorities on behalf of complainant, being applicable to the ownership of lands, are not applicable to this situation where political jurisdiction is involved.

VI.

We do not question the soundness of the proposition that a state may not tax lands or other property of the United States but we insist that such principle is inapplicable to the present case. The State of Tennessee did not undertake to tax the lands in question as the property of the United States but on the contrary, sought to tax them as property of the individuals to whom it had conveyed the same.

ARGUMENT ON BEHALF OF DEFENDANT.

I.

THE COMPLAINANT WAS UNDER NO DISABILITY SO FAR AS THE EXERCISE OF JURISDICTION OVER THE LANDS IN CONTROVERSY IS CONCERNED.

The tenor of the beginning of the argument on behalf of the complainant is that since title to the land may have been in the United States, the complainant, the State of Arkansas, could not exercise any jurisdiction over the same. This contention must proceed from an erroneous conception of the nature of adverse possession on the part of one state against another. It is the exercise of governmental jurisdiction over the area in controversy which this Court has held constitutes adverse possession. Throughout all the cases dealing with the question of adverse possession on the part of one state against the claims of another, it is the exercise of governmental jurisdiction that has been stressed by this Court. Little reference appears in the reported cases to the ownership of the soil in question but as stated, the exercise of governmental jurisdiction is the crux of adverse possession on the part of one state as against another.

Throughout all the cases which deal with this question, the service of process, both civil and criminal, the establishment of schools and roads, the extension of franchise to the inhabitants of the area in controversy, the performance of marriages under the authority of the state setting forth the claim, the assessment and collection of taxes, both upon property and persons in the area in question, and other matters which might be mentioned have prominently figured in the opinions of this Court. So far as the title to the lands is concerned, that has

been treated as merely incidental to the exercise of governmental functions by the state insisting upon its rights by adverse possession.

At the risk of being repetitious, may we again reiterate what we have stated in the beginning of this brief and that is, that this controversy between the two states in question involved not the title to or ownership of the lands in question but on the contrary, the exercise of political or governmental functions over the area in question. If we concede for the sake of argument that the true title to these lands still remains in the United States, yet under the holdings of this Court that fact presented no barrier to the exercise of governmental functions by the complainant, State of Arkansas.

It must be remembered in this connection that the land in question, if the property of the United States, was merely land within the State of Arkansas title to which the United States had not granted to the State of Arkansas. It was not land acquired by the United States with the consent of the state for any of the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution of the United States nor was it land reserved by the Federal Government in the Act admitting Arkansas into the Union but on the contrary, it was ordinary land to which the United States merely retained title.

Perhaps the clearest statement of the rights of a state in connection with lands of this character is found in the opinion of this Court in *Surplus Trading Co.* v. *Cook, supra,* as follows:

> "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. *Such ownership and use without more do not withdraw the lands from the jurisdiction of the State.*

> *On the contrary, the lands remain part of her territory and within the operation of her laws,* save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." (Italics ours.)
>
> Page 650.

Holdings to a similar effect are found in *Onaechevarria* v. *U. S., supra,* and *Ft. Leavenworth Ry. Co.* v. *Lowe, supra.*

In fact, it can hardly be disputed at this date that the ordinary ownership of lands in a state by the United States does not divest the state of power to enforce its laws on such lands except to the extent that its statutes may embarrass or hinder the United States in its ownership thereof. The United States is not a party to this litigation and has made no contention that the laws of the complainant were of such a nature as that their application to the lands in question would have been inconsistent with its authority as owner thereof.

The record shows that a number of people resided upon the lands in controversy and that they were subject to the payment of per capita taxes as well as taxes for the upkeep of the public roads and that processes were emanating from the courts of Tennessee and being served upon the territory in controversy and that in fact, Tennessee exercised jurisdiction to the bringing of suit and for approximately 100 years between the admission of the complainant into the Union and the institution of this suit.

II.

THE APPLICATION OF THE DOCTRINE OF ADVERSE POSSESSION AS BETWEEN STATES OF THE UNION.

The defendant thinks it thoroughly settled under previous decisions of this Court that one state of the Union may set up and enforce a claim to territory, perhaps originally legally belonging to another state of the Union, by adverse possession of such disputed territory for a sufficient time. The authorities to this effect are collated in the brief proper and will not be repeated here but excerpts from a very few of them will be set forth in order that this Court may be without doubt as to this rule.

In *Michigan* v. *Wisconsin*, 270 U. S., 295, 308, we find the following clear statement of this rule:

> "That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, (1877) L. R. 2 A. C., 394, 421; Wheaton, International Law, 5th Eng Ed., 268-269; 1 Moore, International Law Digest, 294 *et seq.*, and, a *fortiori*, to the quasi-sovereign states of the Union. *The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority. Indiana* v. *Kentucky*, 136 U. S., 479, 509, *et seq.; Virginia* v. *Tennessee*, 148 U. S., 503, 522-524; *Louisiana* v. *Mississippi*, 202 U. S., 1, 53; *Maryland* v. *West Virginia*, 217 U. S., 1, 40-44; *Rhode Island* v. *Massachusetts*, 4 How., 591, 639; *Missouri* v. *Iowa*, 7 How., 660, 677; *New Mexico* v. *Colorado*, 267 U. S., 30, 40-41." (Italics ours.)

From *Maryland* v. *West Virginia*, 217 U. S., 1 ,43, 44, we quote the following:

> " 'There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life.'
>
> "In *Louisiana* v. *Mississippi*, 202 U. S., 1, 53, this court said:
>
> " 'The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.'
>
> "An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations."
>
> * * *
>
> "The effect to be given to such facts as long continued possession 'gradually ripening into that condition which is in conformity with international order,' depends upon the merit of individual cases as they arise. 1 Oppenheim International Law, Sec. 243. *In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without do-*

ing violence to principles of established right and justice equally binding upon States and individuals." (Italics ours.)

From Hyde upon International Law (1922), we quote the following:

"Respect for the principle of prescription prevents a State which may have long slept upon its right, from retaining a solid claim to exercise them at the expense of a foreign occupant whose possession satisfies certain requirements which practice has demanded. The strength of the equities of the latter lies in the implied acquiescence in the condition of affairs which its own conduct in relation to the land concerned has produced."

"Recognition of the principle of prescription has been due to the importance attached to the maintenance of a stable condition of affairs among States. *It has been deemed more desirable to the family of nations that an occupant long in possession should be suffered to remain in unmolested control, than that an adverse claimant, although unjustly deprived of possession, should retain its rights of sovereignty, unless it made constant and appropriate effort to keep them alive, and that by ceaseless protests against the acts of the wrongdoer."* (Italics ours.)

Pages 192-93.

Although the Master in his Report has found that Tennessee continuously exercised dominion and jurisdiction over the area in controversy from 1826 until the date of filing this suit (see Report of Special Master, paragraph 11, p. 78), and no exception has been taken by the complainant to this finding, we wish to comment briefly upon such fact. We seriously doubt if a more complete case of the exercise of exclusive jurisdiction over an area by a state could be established. It is perfectly true that prior to 1870 the record contains but frag-

mentary illustrations of the exercise of such jurisdiction but since the year 1870, the record shows that every act of a governmental nature performed in connection with the area in controversy was performed under the auspices and authority of Tennessee. The presumption naturally exists that Tennessee at all times prior to that time, beyond which the memory of living witnesses fails to reach, exercised the same governmental functions over this territory.

Throughout this entire record there is not a scintilla of evidence to show that the complainant, State of Arkansas, ever sought to perform any governmental functions in connection with the area in controversy. Not only is there an utter absence of proof tending to show that the complainant ever performed any governmental functions but on the contrary, the defendant, State of Tennessee, assumed more than its rightful burden in the matter and by the testimony of an old resident of the State of Arkansas showed affirmatively that during his lifetime he never knew of any of the residents of the territory in question undertaking to vote in the complainant state; that while he was a justice of the peace for forty years, no process from his court, either civil or criminal, issued with respect to matters occurring in this territory and last but not least, the area in question was always considered and spoken of as being in Tennessee by those residents of the State of Arkansas most proximate to such lands.

In addition thereto, it is shown without contradiction that the records of Arkansas contain no conveyances purporting to affect the titles to any of the lands embraced in the area in controversy; that the maps issued by the General Land Office of the United States for the State of Arkansas embrace none of the territory in controversy and that although the State of Arkansas, by appropriate government survey, was laid off into

townships and surveyed as such, the lands in controversy were never surveyed by the United States Government as part of the State of Arkansas.

It is rather difficult to conceive of a clearer case of adverse possession upon the one hand upon behalf of the defendant, State of Tennessee, and of acquiescence upon the other upon behalf of the complainant, State of Arkansas.

On June 15, 1836, the date upon which Arkansas was admitted into the Union, its right to exercise governmental functions over the land in question was as clear and perfect as it was upon the day upon which this suit was brought. For almost 100 years the complainant, State of Arkansas, acquiesced in the exercise of jurisdiction over the area in dispute by the State of Tennessee, without the slightest effort to challenge such exercise of jurisdiction. The claims of Tennessee to this territory were not matters of secrecy. Beginning in 1823, Tennessee began to exercise jurisdiction thereover by undertaking to dispose of the lands in the area in question under statutes permitting the entry and grant of public lands.

As early as 1848, Tennessee was undertaking to sell portions of the lands embraced in the area in controversy for the nonpayment of delinquent taxes. All during the period from 1823 until 1860 entries and surveys of various portions of the lands in this area were being made under the authority of Tennessee and grants were being issued by the State of Tennessee to the individuals so entering and surveying such land. In 1872 the question of the correlative rights of Tennessee and of Arkansas to these lands was presented to the Supreme Court of Tennessee. That body in an opinion (*Moss* v. *Gibbs*, 57 Tenn., 283), held that the lands were lawfully under the jurisdiction of Tennessee and made the claims of Tennessee a matter of public notoriety.

The record shows that the persons now in possession of the lands in controversy deraign their titles from the State of Tennessee and as recognized by this Court in *Maryland* v. *West Virginia, supra,* the moral considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided should cause this Court to repel the contention of the complainant in the present litigation.

III.

THE CONTENTION THAT ADVERSE POSSESSION WILL NOT SUFFICE TO CONVEY TITLE WHERE OTHERWISE THE BOUNDARY BETWEEN TWO STATES WOULD BE FIXED BY THE DOCTRINE OF THE THALWEG.

This contention was invoked by the complainant before the Special Master and despite his able and masterly refutal thereof, it is still pressed by the complainant upon this Court. It finds as the base upon which it is moored, an expression of this Court in the case of *Arkansas* v. *Mississippi, supra,* wherein the learned Justice who delivered the opinion in that case made the statement that the Court was unable to find occasion to depart from the rule of the thalweg because "of long acquiescence in enactments and decisions, and the practice of the inhabitants of the disputed territory in recognition of a boundary."

That the question of adverse possession was not present in either this case or in that of *Arkansas* v. *Tennessee, supra,* which is likewise relied upon the complainant, is made perfectly clear from an examination of the original records in these causes by the Special Master. Upon this point, the

Special Master stated the result of his examination of the briefs and records in these two cases as follows:

> "In the brief for Mississippi in *Arkansas* v. *Mississippi*, 250 U. S., 39, at p. 60, it is said that there were no inhabitants of the territory in controversy by reason of its character. In that case it appears from the brief for Arkansas, page 29, and the record, pp. 339, 340, 345, that taxes on the lands were paid only in Arkansas and the lands were not assessed in Mississippi; the record at p. 369 shows a probate sale of the lands in Arkansas. Thus such evidence as there was of the exercise of dominion and jurisdiction seems to have been in favor of Arkansas, which prevailed in the case.
>
> "In *Arkansas* v. *Tennessee*, 246 U. S., 39, the brief for Tennessee on the motion to settle principles, pp. 49-73, and the brief for Tennessee on the merits, pp. 16-25, show that Tennessee's contentions rested solely upon the claim that both Arkansas and Tennessee had by statute and judicial decision recognized the boundary line between them as a line equidistant between banks. See also the brief for Arkansas on the motion to settle principles, pp. 57 ff., and the stipulation of facts on which the case was submitted, record p. 39."
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> Report of Special Master, p. 68.

Opposing counsel have not pointed out from the original records themselves, or the briefs in connection therewith, any facts tending to overthrow the conclusion of the Special Master from his examination thereof. On the contrary, he expressly finds that in neither of these cases was there any evidence of the exercise of dominion and jurisdiction in favor of either of the parties to the controversy except that the record showed that taxes upon the lands in question had been paid only to the State of Arkansas and that a probate sale thereof had been made under the authority of that state, the successful party to the litigation.

As the writer of this brief reads the opinion of this Cour in each of the two above mentioned cases (not having acces to the original transcript), it was insisted in each of them tha the statutes and decisions of the two states had recognized a the true boundary line between the states a line equidistan from the well defined banks of the Mississippi River and fo that reason, the complainant therein was estopped to insis that the thalweg was the true boundary line.

That this is a proper conclusion is made obvious by a refer ence to the opinion of this Court in each of the two cases be cause in each of such cases a reference is made, so far as th State of Arkansas was concerned, to the case of *Cessil* v. *State* 40 Ark., 501, and cases following it.

In *Arkansas* v. *Mississippi, supra,* the matter apparently re lied upon by the State of Mississippi was the decision of it Supreme Court in the case of *Magnolia* v. *Marshall,* 39 Miss 109. That case merely holds that a riparian owner upon th Mississippi River takes title to a line equidistant between th banks by virtue of his riparian ownership.

It will be seen by even a casual reading of the two opinion relied upon by the complainant that no where therein is ther made any mention of adverse possession upon the part o either state claiming the territory with the exception of th notation made by the Master from his examination that in th case of *Arkansas* v. *Mississippi, supra,* there was some evidenc of adverse possession upon the part of Arkansas, the prevail ing party in that case. Surely, had there been any substantia evidence of adverse possession in either of these cases, the la with reference thereto had theretofore become so well settle by prior decisions of this Court as to warrant at least a men tion thereof.

It is our insistence that the later opinions of this Court warrant the conclusion that the law of adverse possession by one state against another is applicable, although in the absence of the existence of such adverse possession the boundary between such states would be determind by the application of the rule of thalweg.

Mr. Justice Cardozo, who delivered the opinion in the case of *New Jersey* v. *Delaware*, 291 U. S., 361, and who reviewed the origin and development of the thalweg, in that very case recognizes that it is neither infallible nor inflexible for we find, in his learned dissertation, the following excerpt:

> "Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. *Unless prescription or convention has intrenched another rule* (1 Westlake, International Law, p. 146), we are to utilize the formula that will make equality prevail." (Italics ours.)
>
> Page 383.

The underscored language beyond peradventure recognizes the fact that prescription (under which name the writers upon International Law treat what we term adverse possession) may prevail over the rule of the thalweg.

In *Vermont* v. *New Hampshire*, 289 U. S., 593, 597, where Vermont claimed that the doctrine of the thalweg was applicable, the Special Master to whom the case was referred by this Court, concluded as a matter of law "that Vermont's claim of a boundary at the thread of the river would be defeated by her acquiescence in New Hampshire's exercise of dominion over the waters of the river even if it had not been relinquished by acceptance of the resolutions of Congress of

August, 1781, and finally that by practical construction of the two states by long usage and acquiescence, the boundary of Vermont was fixed at the low-water mark on the west side of the river."

Page 597.

Unfortunately, Vermont filed no exceptions to this conclusion of the Master and the matter was not authoritatively adjudicated by this Court, but in sustaining the conclusions of the Special Master upon matters of law as to which exception was taken, this Court expressly stated that the conclusions which the Court had reached found support in the practical construction given by both states to the boundary thus defined (see p. 613).

Likewise, in *Michigan* v. *Wisconsin, supra,* in dealing with that portion of the boundary dispute known as the Green Bay section where the boundary was fixed by the appropriate statutes as running through "the center of the most usual ship channel of the Green Bay, of Lake Michigan to the middle of Lake Michigan," this Court held that the long continued exercise of political jurisdiction over certain islands in this bay authorzed the decree in favor of Wisconsin for the territory embraced in such islands irrespective of the proper location of such ship channel.

Thus, although in the absence of adverse possession the doctrine of the thalweg would have been applicable, we find this Court giving adverse possession a controlling effect in the face of the insistence that the doctrine of the thalweg applied.

After all, the doctrine of the thalweg is nothing more or less than a rule of construction, applicable to statutes and treaties dealing with the common boundary of two states or two nations upon navigable waters. It simply means that

where the boundary of such adjacent states or nations is fixed as the middle of such navigable waters, such will be construed as meaning the middle of the navigable channel thereof so as to accord to each state or nation equality of navigation in such navigable water. Such doctrine expressly yields to the principle of law that an avulsion does not change property lines but that they remain in the center of the abandoned channel. See *Nebraska* v. *Iowa, supra;* also *Missouri* v. *Nebraska,* 196 U. S., 23; *Arkansas* v. *Tennessee, supra;* and *Arkansas* v. *Mississippi, supra.*

Such doctrine yields to positive language at variance therewith.

Oklahoma v. *Texas,* 256 U. S., 70;
Texas v. *U. S.,* 162 U. S., 1;
Handly's Lessee v. *Anthony,* 5 Wheat. 375;
Buttenuth v. *St. Louis Bridge Co.,* 123 Ill., 535, 17 N. E., 439;
Hyde, International Law (1922 Ed.) 248.

We, therefore, respectfully insist that there is no foundation in the opinions of this Court for the insistence that the rule of the thalweg will prevail over adverse possession of the territory in question by one state as against another but that on the contrary, since the doctrine of the thalweg is but a rule of construction, it yields to positive principles of law and that the opinions of this Court tacitly, if not directly, recognize such principle.

In the brief filed in this Court on behalf of complainant (see Brief State of Arkansas, pp. 32-33), there is made the statement that in the case of *Arkansas* v. *Mississippi, supra,* the facts were somewhat similar to the present case and that the decision of this Court in that case refused to follow a boundary line between the two states which had been agreed

upon and acquiesced in by local authorities. Certain it is that the opinion of this Court in the case above mentioned reveals no such state of facts and whether opposing counsel drew this conclusion from a map of the terrain, made many years after; from the original record in the cause or from thin air is left entirely to conjecture. The conclusions stated by opposing counsel are diametrically opposed to the conclusion drawn by the Special Master from his examination of such record (see Report of Special Master, footnote to p. 68) and if the impression is intended to be conveyed that this contention is founded upon a perusal of the original transcript in this cause, the proprieties of the situation would suggest that due regard for the Special Master, as an arm of this Court, would require citations to and excerpts from the record in that cause which it is insisted negative the conclusions of the Special Master, drawn from his examination thereof. In the absence of a showing that such conclusion is drawn from an examination of such record and a support thereof by apt references to such record, the defendant thinks that this Court would be justified in treating the above mentioned portion of the brief on behalf of the complainant as unsupported, in the face of the conclusion of the Special Master to the contrary, made after an examination of such record by him.

IV.

THE AUTHORITIES DO NOT SUPPORT THE CONTENTION THAT ADVERSE POSSESSION BETWEEN STATES APPLIES ONLY WHERE THE TRUE LINE IS DIFFICULT OF DELINEATION.

As we read the authorities upon this proposition they do not ingraft upon the rule of adverse possession the exception contended for by the complainant but lay down the direct rule without any exception whatever thereto.

See *Michigan* v. *Wisconsin*, 270 U. S., 295, 308;
Maryland v. *West Virginia*, 217 U. S., 1, 42;
Indiana v. *Kentucky*, 136 U. S., 479, 510;
Wheaton, International Law, 6th Eng. Ed., 336;
Hall, International Law (1924), sec. 36.

Reason would seem to be opposed to the rule contended for by the complainant. In cases where the true line be doubtful or not readily susceptible of identification, such fact might furnish a legitimate excuse for a failure to act at an earlier date through ignorance of the true location of such line. Conversely, if the true line be clear, obvious and readily susceptible of location (as is stated by complainant in its brief), ignorance of its true location is thereby negatived and a failure to take steps to promptly establish such true line can not be ascribed to ignorance but on the contrary, can be referred only to a desire to acquiesce in another line for which the opposing party is contending.

While the record does not show that the line contended for by the complainant has been at all times capable of location, the complainant strenuously contends that it is now capable of such identification and from this contention upon its part, the presumption naturally arises that such line was capable of

location and identification at all times anterior to the present time. Then too, if the complainant should undertake to excuse its acquiescence in the line claimed by defendant upon the ground that the true line could not be located, the burden of showing such fact would rest upon it and the testimony before the Special Master contains no proof whatever that the line claimed by complainant was any more incapable of location since 1836 than it is at the present time.

V.

IF A CONTROVERSY AS TO THE LOCATION OF A BOUNDARY BE A PREREQUISITE TO ADVERSE POSSESSION, SUCH CONTROVERSY IS FOUND IN THE PRESENT CASE.

As before stated, when the complainant was admitted into the Union, its eastern boundary was fixed as the middle of the main channel of the Mississippi River. Opposite the lands in controversy there were at that time two channels of the Mississippi River, the one to the west of the lands in controversy being the main channel of the river at such time and the channel east of the lands being the former main channel prior to the avulsion of 1821. We say that the channel west of the lands in question was the main channel because the Special Master expressly found such to be the fact and his report in that particular stands unexcepted to.

It is perfectly true that the controversy in question was one of law as to which channel of the river constituted the main channel thereof within the contemplation of the statute admitting Arkansas into the Union, rather than a controversy of fact as to the location of a line theretofore established but the defendant insists that if a controversy be a condition pre-

cedent, it becomes immaterial whether such controversy be one of law or of fact. The defendant likewise thinks it immaterial that the boundary was a natural one, carved by the elements, rather than one established by human action upon the ground.

It must be remembered also that at the time this adverse possession began, this Court had not definitely laid down the rule that an avulsion did not change the boundary line between states and that although there was an intimation to that effect in the case of *Missouri* v. *Kentucky*, 11 Wall., 395, it was not definitely made certain until 1892 in the case of *Nebraska* v. *Iowa*, 143 U. S., 359.

Now with the matter in this condition and the two channels existing in the vicinity of the lands in controversy at the time of the admission of the complainant into the Union and thus a controversy being present as to which, from a legal standpoint, constituted the main channel of the Mississippi River, the defendant entered upon the lands in question and set forth its claim that the channel caused by the avulsion of 1821 was the true boundary line within the meaning of the Congressional Acts and proceeded to exercise jurisdiction of every kind over such lands up to such channel for virtually 100 years prior to the bringing of this suit. Its contention, while erroneous under later decisions of this Court, from a legal standpoint, had a factual basis in the undisputed fact that the channel to which it claimed and held was in fact the main channel at that point.

Opposing counsel virtually concede that had there existed two channels of the Mississippi River surrounding the lands in controversy, at the date of the fixation of the boundary between the two states, the adverse possession of Tennessee

of the lands in controversy would require a finding by this Court that the channel claimed by Tennessee was the true main channel of the river and the boundary between the two states. The defendant contends that since, therefore, the legal questions governing the proper location of the boundary between the states at the point in question had not been settled authoritatively through decisions of this Court, a controversy, although legal in nature rather than factual, existed, as the true boundary line and under the virtual concession of opposing counsel, the doctrine of adverse possession would apply and, therefore, require a decision of this Court in favor of the defendant.

VI.

REPLY TO SOME CONTENTIONS ADVANCED BY COMPLAINANT.

On pages 27 and 28 of the brief on behalf of the complainant, it is stated in substance that what is termed the practices of the inhabitants of the territory in question should not be permitted to determine the question of the true boundary. Opposing counsel seized upon the phrase "the practices of the inhabitants of the disputed territory" in the case of *Arkansas* v. *Mississippi, supra,* and with undue tenacity has sought to make use of this phrase throughout this entire litigation. The evidence in the case is not directed to the so-called practices of inhabitants but on the contrary, shows definite and affirmative exercise of political and governmental jurisdiction by the defendant over the lands in controversy. The levying of taexs, the granting of lands, the execution of process, the holding of elections, the establishment of schools and roads, the authorization of the solemnization of the rites of matrimony can hardly be called practices of inhabitants. On the contrary,

they are governmental functions which can be performed only under authority of a state or similar governmental body of equal dignity.

Opposing counsel paints a dire picture of what might occur through collusion of inhabitants with local authorities of a state. The answer to this Cassandra-like prophecy is that there will be time enough to rule upon such situation when one is presented, which is not done by this record, for the actions relied upon by the defendant are its own actions rather than any so-called practices of inhabitants of the territory in question.

Again, counsel for complainant insist upon demonstrating to their own satisfaction that the two Congressional Acts referred to (Act of February 18, 1841, 5 Stat. 412; Act of August 7, 1846, 9 Stat. 66), did not vest jurisdiction in the defendant over the lands in controversy. The defendant has never insisted in the present proceeding that such was the case.*

The Report of the Special Master shows this fact (see paragraph 2, p. 30).

As stated in an earlier part of this brief, these Acts, if applicable, apply only to the ownership of such lands and not to the sovereignty thereof.

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*We quote from our reply brief before the Master: "Nowhere in either the pleadings, the proof or the brief has the defendant, State of Tennessee, insisted that these two congressional statutes vested the State of Tennessee with title to this land as against the complainant. The only contention that Tennessee has ever made in connection with these statutes is that their passage, together with the opinion of the Supreme Court of Tennessee in *Moss* v. *Gibbs*, 57 Tenn., 283, construing these acts, was to constitute of them and of this decision color of title upon which an adverse holding of the lands in question on the part of the State of Tennessee might be based if color of title be a prerequisite to adverse possession, a matter which we specifically deny under the authorities that will be presented later."

VII.

BLUE GRASS TOWHEAD

Blue Grass Towhead is shown by the record to be a formation physically attached to the eastern shores of the land in controversy, formed since 1916, east of the thalweg of the Mississippi River as it now exists. It has been formed by the gradual processes of the river. This is conceded in the brief of opposing counsel, as being sustained by the record (see pages 53-54, Brief for Complainant).

The Special Master found, correctly as we insist, that by adverse possession upon the part of Tennessee and acquiescence therein on the part of the complainant, the State of Arkansas, the thalweg of the channel formed by the avulsion of 1821 had been recognized for approximately 100 years as the boundary between the states and that irrespective of the true original boundary, adverse possession by Tennessee up to this thalweg and the acquiescence by Arkansas in such possession by Tennessee had made of this thalweg the true boundary.

He concluded as a matter of law, that since Blue Grass Towhead formed east of the thalweg of this channel which had become by adverse possession on the one hand and acquiescence on the other, the true boundary, it thusly became the property of Tennessee not through any adverse possession of Blue Grass Towhead but because it was land which formed in the bed of the Mississippi River east of the true boundary between the states and which became physically attached to the east or Tennessee shore of the river. In such conclusion, we respectfully insist that the Special Master did not err.

CONCLUSION.

With all sincerity, we respectfully insist that the claim of complainant is not one to appeal to the conscience of any tribunal. The lands in question were cast upon the doorstep of Tennessee by the action of the elements. Tennessee settled it, policed it and provided a government for it for virtually 100 years prior to the bringing of this suit. The true mother (if we may call the complainant such) of this orphan of the storm sat idly by, while the foster-mother labored long and diligently to bring this territory to the bloom of productivity and after a century, the complainant seeks to reclaim that which it so consistently ignored during that period of time.

The defendant respectfully insists that the situation in the present case is directly in point with the language used by this Court in the case of *Maryland* v. *West Virginia, supra,* wherein this Court said: "There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life." In *Maryland* v. *West Virginia, supra,* the lapse of time between the establishment of the line sought to be impeached and the bringing of the suit was 103 years, while in the present case, it is 99 years. The increased tempo of this modern age with the facility of opportunity for acquiring information should constitute an adequate differential between the 103 years in that case and the 99 years in the present case and require a like conclusion at the hands of this Court.

Counsel for the defendant would feel derelict if in conclusion it did not express its appreciation to this Court for the

consideration accorded counsel for both parties by the Special Master in his hearing of the matter. He was at all times courteous, patient and accommodating to both parties, accorded to each unlimited time for the preparation of its case, accorded to each unlimited time for the argument thereof and finally, in his determination of the case, he has exhibited a true grasp of the legal principles involved, and considered every proposition advanced by either party, some of them, on each side, no doubt inane; but despite this, he accorded to such the same careful consideration that he gave to the principles that he ultimately deemed controlling. In fact, his Report requires but little defense at our hands.

In conclusion, the defendant, State of Tennessee, respectfully insists that the Special Master reached the correct conclusion in his Report to this Court and that the exceptions to his Report should be overruled and his recommendations for a decree be made the decree of this Court.

Respectfully submitted,

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I hereby certify that I have furnished three copies of this brief for the Honorable D. Fred Taylor, Jr., of Osceola, Arkansas, of adverse counsel, this March ....., 1940.

(Signed) NAT TIPTON,
Attorney for Defendant.

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